INTERIOR BOARD OF INDIAN APPEALS

Estate of Rachel Nahdayaka Poco

54 IBIA 248 (02/09/2012)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

ESTATE OF RACHEL NAHDAYAKA POCO	)	Order Affirming Decision
	)	
	)	Docket No. IBIA 10-080
	)	
	)	February 9, 2012

Carlita C. (Dusty) Poco Couch (Appellant) appealed to the Board of Indian Appeals (Board) from the March 19, 2010, Order Docketing and Dismissing Petitions for Rehearing (March 19 Order), entered by Administrative Law Judge Richard L. Reeh (ALJ) in the estate of Appellant's mother, Rachel Nahdayaka Poco (Decedent), deceased Comanche Indian, Probate No. P000066418IP.[1] In dismissing the petitions for rehearing, the ALJ left intact his January 6, 2010, Order Determining Heirs, Approving Will and Decreeing Distribution (Order Determining Heirs), in which Decedent's trust real property was ordered to be distributed to her son, Lonnie Poco (Lonnie), pursuant to the terms of her August 1, 2002, will (August 1 will). We affirm.

Appellant asserts that the ALJ erred because he did not provide Appellant sufficient time to gather all of Decedent's medical records to show that Decedent lacked testamentary capacity at the time of the August 1 will or to gather evidence to show that Lonnie used bribery and exerted undue influence on their mother to write her will in his favor. The ALJ gave Appellant several opportunities to obtain the documentation she believed was necessary, and we hold that he was not required to reopen the record to permit additional discovery after issuing his Order Determining Heirs.

Facts

Decedent, a Comanche Indian, was born in 1917 and died on December 31, 2007. She was survived by eight children: Rechinda Hatfield, Marcus Bob Poco, Carmelita Wynkoop, Carlos Poco, Leonard Poco, Dora Spiegel, Lonnie, and Appellant; one son, Denver Poco, predeceased Decedent. According to the estate inventory, Decedent owned a trust allotment of 1.25 acres, Allotment No. 2275-E, which was her homestead. She also

[1] In addition to Appellant, three of Appellant's siblings also sought rehearing. Only Appellant appealed the ALJ's March 19 Order to the Board.

owned a 1/9 minerals-only interest in Allotment No. 2275-B. There was a zero balance in her Individual Indian Money account at the time of her death.

On August 1, 2002, Decedent went to the Anadarko, Oklahoma, office of the Bureau of Indian Affairs (BIA) and executed a new will.[2] In this will, Decedent left her entire estate to Lonnie, with small cash bequests to her remaining surviving children.

When the matter of probating Decedent's trust estate was referred to the Probate Hearings Division, the ALJ scheduled a hearing for March 18, 2009, and sent each of Decedent's surviving children a notice of the hearing along with a copy of the August 1 will. The notice informed the recipients that, *inter alia*, "[t]estimony will be taken and evidence received for the purpose of . . . probating the will . . . ." Notice of Initial Hearing, Feb. 23, 2009. Four of Decedent's children, including Lonnie and Appellant, attended the March 18 hearing.

At the March 18 hearing, the ALJ took testimony from the will scrivener and the will notary concerning the execution of the August 1 will. Appellant contested the August 1 will on the grounds that she had moved into Decedent's house in 2004, that she had taken care of Decedent until she passed away, and that she understood that Decedent intended to leave her the homestead in return for taking care of her. Hearing Transcript, Mar. 18, 2009, at 32:2-10, 33:2-35:9. She also testified that Decedent told her that she had been diagnosed with dementia. *Id*. at 32:2-10.

At the end of the hearing, the ALJ announced that he would continue the hearing "to receive further statements about the validity of the will," *id*. at 55:2-3, and advised the attendees to "focus" their attention and efforts on that issue, *id*. at 55:17-20. He told the attendees that he would give them notice in advance of the next hearing date.

Subsequently, the ALJ scheduled the next hearing for September 23, 2009, and gave the parties 3 weeks' notice. Additional testimony was received, and several of Decedent's children, including Appellant, asserted that Lonnie had exerted undue influence over Decedent by driving her to Anadarko to make out her will and "bribed" her into changing her will by giving her money. Lonnie admitted that he drove Decedent to BIA and that he gave her money to pay her bills and to store some of his belongings at her house.

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[2] Previously, Decedent executed a will at BIA in May 2002. In the May 2002 will, Decedent had left her estate in equal shares to three of Appellant's sisters, with the exception of small cash bequests to Decedent's remaining surviving children, including Appellant.

Also on September 23, Appellant produced some of Decedent's medical records. The ALJ pointed out that the records appeared to be dated from 2006 and 2007, long after Decedent executed her August 1 will, and told Appellant that the relevant time period was August 2002 when the will was executed. The ALJ continued the hearing to the next day at which time Appellant told the ALJ that the additional medical records needed to be retrieved from a Federal records storage facility. The ALJ announced that he would hold the record open until November 1, 2009, to receive additional medical records dated January 1, 2000, through October 1, 2002, and that the parties should let him know if they needed any additional time. Thereafter, the ALJ received additional medical records, and no one submitted a request for additional time to submit further evidence.

The ALJ reviewed the medical records, and found no mention of any concern about Decedent's mental acuity or dementia until 2006. He noted that an entry dated August 16, 2006, said, "dementia 1.5 years," Order Determining Heirs at 4, which would place the onset of Decedent's dementia around February 2005. Thus, the ALJ determined that Appellant had not met her burden of showing that Decedent lacked testamentary capacity on the day she executed her August 1 will. He also determined that there was no basis for concluding that Lonnie exerted undue influence on Decedent. The ALJ then approved the August 1 will and ordered the distribution of Decedent's trust estate to Lonnie.

Appellant sought rehearing, arguing that she and her siblings did not have enough time to obtain statements from the bank to prove that Lonnie gave Decedent money at the time she changed her will. Appellant argued that Lonnie lied in his testimony before the ALJ when he denied taking Decedent to Anadarko to change her will. She also asserted that the ALJ did not allow sufficient time to obtain all of Decedent's medical records. She did not identify what records were missing. Appellant also argued that she was the one of her brothers and sisters that took care of Decedent during the last years of her life and none of the others helped. She produced a number of letters from friends and community members who attested to her devotion to Decedent.

In dismissing Appellant's petition for rehearing, the ALJ addressed each of Appellant's arguments in detail. He explained that there was no evidence in the additional medical records or witness statements to suggest that Decedent had any difficulty with her memory or mental acuity at the time she executed the August 1 will. He explained that proving that Lonnie gave Decedent money at the time she executed the will and proving that Lonnie drove her to BIA on the day she executed the will would not, without more, show undue influence and undermine the will. Finally, the ALJ pointed out that the request for additional time to seek evidence supporting either of these theories came too late. As the ALJ stated, "petitions for rehearing are not to be used as vehicles for the

initiation or continuance of investigations that should have been undertaken before issuance of decisions." March 19 Order at 2.

This appeal followed. Appellant and Lonnie both filed briefs.[3]

Discussion

In her appeal to the Board, Appellant restates the same arguments that she made to the ALJ, i.e., that she was not given sufficient time to obtain the documents she needed. But this argument, without more, fails to meet Appellant's burden of showing error in the ALJ's March 19 Order. Therefore, we affirm the denial of rehearing.

Aggrieved individuals are afforded the opportunity to seek rehearing in an Indian probate proceeding on "proper grounds," i.e., grounds that appear to "show merit." *See, e.g.*, 43 C.F.R. § 30.240. Such grounds do *not* include requests for additional time to seek evidence. In *Estate of Drucilla (Trucilla) W. Pickard*, 50 IBIA 82 (2009), the appellant raised the same argument as does Appellant here: She needed more time to obtain evidence to challenge the will approved by the ALJ. The Board affirmed the denial of rehearing because the appellant was unable to identify any specific evidence and show why she was unable to produce it at the hearing. She simply wanted "to gather new evidence." 50 IBIA at 91-92. The Board agreed with the ALJ that the appellant's petition failed to comply with the requirements of 43 C.F.R. § 4.241 (2006) (now found at 43 C.F.R. § 30.238) in setting forth "proper grounds" for rehearing. We stated that when an appellant claims that the evidence is incomplete, appellant's burden is to identify the missing evidence and explain why it was not presented earlier. *Id*. at 91. In particular, we held that "[a] petition for rehearing is *not* an opportunity for a[n appellant] to start an investigation to support her position." *Id*. at 92.

Here, Appellant knew about the August 1 will as early as February 2009 when the ALJ provided Appellant with a copy of the will with his notice of hearing. Therefore, Appellant then had 3 weeks to review the 3-page will and determine what evidence she would need to challenge the will. At the March 18 hearing, the ALJ took testimony from the will scrivener and notary, then continued the hearing for 6 months to permit Appellant and other parties to gather evidence to challenge the will. Appellant did produce medical records when the hearing reconvened in September 2009, and sought additional time to

[3] Subsequent to briefing, the Board received letters from Lonnie and Marcus that were not served on the other parties to this appeal. Therefore, these letters were disregarded in our consideration of this appeal.

submit more such records. The ALJ specifically informed the individuals in attendance on the last day of the hearings, September 24, 2009, that he would leave the record open until November 1, 2009, to receive and consider additional evidence. And he further added that unless someone requested a continuance or told him why he shouldn't issue a decision, he would review the evidence and render his decision. As Appellant promised, the ALJ received the additional medical records that she arranged for him to receive. None of the parties, including Appellant, sought additional time from the ALJ to search for or provide additional evidence. Only after she received a decision that was adverse to her did Appellant decide to seek additional time to conduct discovery, i.e., to locate evidence in support of her arguments. *See* 43 C.F.R. §§ 30.215-30.222 (regulations governing discovery in Indian probate proceedings). As the Board has previously held, the opportunity to conduct discovery is not a proper ground for seeking rehearing. *Estate of Alfred Chalepah, Sr.*, 51 IBIA 148, 148-49 (2010); *Estate of Pickard*, 50 IBIA at 91-92.

At best, Appellant apparently hopes that she might somehow uncover evidence that will invalidate the August 1 will. The time for conducting formal discovery is prior to the entrance of the initial probate decision, not afterwards. Appellant had ample opportunity prior to November 1, 2009, to gather the evidence she believed necessary. She did not request additional time before the November 1 deadline as the ALJ instructed the parties to do. Therefore, we conclude that the ALJ did not err in dismissing Appellant's petition for rehearing, and we affirm.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board affirms the ALJ's March 19, 2010, Order Docketing and Dismissing Petitions for Rehearing.[4]

I concur:

// original signed	// original signed
Debora G. Luther	Steven K. Linscheid
Administrative Judge	Chief Administrative Judge

[4] During the pendency of this appeal, BIA mistakenly and without authority recorded Decedent's real property interests as having been transferred to Lonnie. Given our affirmance today, BIA's request for an order directing the "return" of Decedent's property to her estate (i.e., the correction of BIA's records) is moot.